

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**HANSON MATERIAL SERVICE
CORPORATION**

Respondent and Employer

and

Case 13-CA-44128

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 150, AFL-CIO**

Charging Party and Petitioner

and

**Cases 13-RC-21618
13-RC-21622**

**LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 681**

Petitioner

*Kevin McCormick and J. Edward Castillo, Esqs., of Chicago, IL,
for the General Counsel.*

*Alex V. Barbour and Jacob Rubinstein, Esqs.,
(Meckler, Bulger & Tilson, LLP),
of Chicago, IL, for the Respondent and Employer.*

*Robert E. Entin and Lauren Shapiro, Esqs., of Countryside, IL, for the Charging Party
and Petitioner, Local 150 Operating Engineers.*

DECISION

Statement of the Case

ROBERT A. GIANNASI, Administrative Law Judge. This consolidated representation and unfair labor practice case was tried in Chicago, Illinois, from November 13 to November 16, 2007. The unfair labor practice complaint, as amended, alleges that the Respondent violated Section 8(a)(1) of the Act by interrogating employees, prohibiting them from wearing union attire and from posting union items on its bulletin boards, threatening employees with discipline and layoffs for engaging in union activities, promising them benefits for rejecting a union and informing them that it would be futile to select a union. The complaint also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully discharging employees Greg Stroud and Ammar Modieh for

engaging in union activities. The Charging Party Union (Local 150 Operating Engineers or the Union) and another union (Laborers Local 681) both petitioned the Board for an election in a 4-employee unit of Respondent's quality control analysts at its Thornton, Illinois facility. In that representation case, the Respondent challenged the votes of Stroud and Modieh, who had, by the time of the Board election, been discharged, on the ground they had been properly terminated for cause. Local 150 Operating Engineers contends that Stroud and Modieh were unlawfully discharged, as alleged in the complaint, and therefore should be entitled to vote. The election resulted in one vote for Local 150 Operating Engineers, no votes for Laborers Local 681, and one vote for no union, leaving the two challenged ballots, which are outcome determinative.¹

The Respondent filed an answer denying the essential allegations of the complaint. It also asserts that the challenged ballots should be sustained and that a certification should issue affirming that the unit employees rejected union representation in the election. After the trial, the parties filed briefs, which I have read and considered.²

Based on the entire record in this case, including the testimony of the witnesses, and my observation of their demeanor, I make the following:

Findings of Fact

Jurisdiction

Respondent, a corporation with an office and a place of business located in Thornton, Illinois, is engaged in the business of mining, processing and selling stone, sand and gravel aggregates in the construction industry. During a representative one-year period, Respondent purchased and received, at its Thornton facility, goods and materials valued in excess of \$50,000 directly from points outside of the State of Illinois. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.³

The Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ Local 150 Operating Engineers filed objections to the election, which were subsequently withdrawn. Laborers Local 681 did not participate in the consolidated hearing.

² The General Counsel filed a petition in United States District Court for Section 10(j) injunctive relief, asking the Court, inter alia, for the immediate reinstatement of Stroud and Modieh. The parties agreed to submit the transcript and exhibits of this proceeding to the District Court in connection with the injunction proceeding. They also agreed to submit evidence in this case on the so-called "just and proper" issue in the injunction case, evidence that is not relevant to the issues in this proceeding, but would be relevant in the injunction case.

³ In June 2006, Respondent purchased the stock of Material Service Corporation, a subsidiary of General Dynamics Corp. and continued in business as Hanson Material Service Corporation. Subsequently, and after the events herein, the Respondent's stock was purchased by an entity identified as Heidelberg Cement. Notwithstanding these changes in stock ownership, the Respondent remains the entity involved in this case.

The Alleged Unfair Labor Practices

Background

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Respondent is a division of Hanson North America, which has facilities throughout the United States. It has a corporate headquarters located in downtown Chicago, Illinois, and operates a number of facilities in the Midwest, including several in Illinois. Its operation at the Thornton facility, also known as the Thornton quarry, employs about 150 employees, under the general supervision of Superintendent Toby Breedlove. The Thornton facility, which produces a crushed limestone product, covers approximately 1,300 acres and is one of the 5 largest crushed stone quarries in the nation. The production process begins at the pit or quarry, where the stone is blasted from the face, loaded onto trucks and carried to a primary crusher. Thereafter, the product goes to a processing plant, which turns out some 40 different products that are shipped to different points in Illinois, Indiana and Michigan. Much of the finished product is used on state road projects and Respondent is regulated to some extent by the state departments of transportation for Illinois, Indiana and Michigan.

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Of the 150 employees working at the Thornton quarry, most are represented by unions and those employees are identified as hourly employees. Among the represented employees are some 30 to 40 heavy equipment workers, who are represented by a local of the Operating Engineers; about 45 employees represented by Local 701 of the Machinists Union; about 50 laborers represented by Local 681 of the Laborers Union; some 25 truckdrivers represented by a Teamsters union; and about 6 electricians represented by Local 134 of the International Brotherhood of Electrical Workers. The non-represented employees are identified as salaried employees, whether they are paid by salary or by the hour; the latter are identified as salaried employees-exempt. There are about 30 non-represented salaried-exempt employees at the Thornton quarry, including various clerical employees and foremen supervisors. Also included among the non-represented salaried-exempt employees are the 4 quality control analysts. Quality control analysts at two of Respondent's other facilities are represented by a local of the Laborers Union; the others are unrepresented.

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The 4 quality control analysts at the Thornton facility work in the quality control lab, a separate building at the facility. Two, Greg Stroud and Ammar Modieh, worked on the first shift from 6 a.m. to 3 p.m.; and the other two, Ed Mecenas and Chuck Breslin, worked on the second shift from 3:30 p.m. to 12:30 a.m. The analysts run two different types of tests on the product—a production test, which involves material from one of the plants; and a stockpile test, which involves material that is stockpiled at the facility after it is produced and before it is shipped. The tests measure whether the product meets state specifications. The analysts gather samples for their tests from the field in buckets and bring them back to the lab where the tests are run. There are two kinds of tests, a full test, which may take as long as two hours, and a quick test, which may take some 15 or 20 minutes, depending on the product. The test materials, or the samples, are split into sections, weighed, and split, and weighed again and again, until the sample reaches the weight set forth in the state specifications. Then the samples are run through sieves and vibrating machines; thereafter, the samples are removed and weighed again. The different

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steps and weights are recorded in handwritten form in a daily log book. Those notations are then entered into a computer, which turns out a so-called gradation report that indicates whether the sample meets the required specification. The gradation report is required by and provided to one of the three states that use the product tested. The states also certify the quality control analysts.

During the relevant time period, the quality control analysts were supervised by General Foreman Chris Pronoitis, who is located in the main office, some distance away from the quality control lab. Although Pronoitis has day-to-day supervisory authority over the quality control analysts, he only spends about 10% of his time in the quality control lab. Two other employees, quality control engineers Randy Polaczek and John Barthel, also spend time at the Thornton quality control lab. Polaczek, who has responsibilities for the Thornton quarry, has an office at the lab; Barthel, who floats between different facilities, but has no responsibilities for the Thornton quarry, also occasionally uses a desk in Polaczek's office. Polaczek and Barthel are employees, not supervisors, and they have no direct authority over the quality control analysts. They handle customer complaints about quality, but they are separately supervised under the authority of Respondent's director of product quality, Brian Rice. Sometime in March 2007, Superintendent Breedlove, through the then-supervisor of the quality control analysts, Mill Foreman Bernie Townsend, directed that the quality control analysts record the time at which each sample was gathered both in the log book and on the gradation reports. This action was taken because of an unusual number of quality complaints about the aggregate product shipped to suppliers; recording the time would enable Respondent to more accurately identify any problems.

The Union Campaign and Respondent's Response

The quality control analysts first sought to obtain union representation in the summer of 2006. Stroud led that effort. He contacted the Union and obtained signed authorization cards at that time, but his effort stalled because of the change in Respondent's ownership at about that same time. Interest in the Union revived in March 2007. On March 2, Stroud again contacted the Union and obtained new signed authorization cards from all of the quality control analysts. Sometime thereafter, the Union contacted the Respondent and attempted to obtain voluntary recognition, which the Respondent declined to give. Subsequently, Superintendent Breedlove and Human Resources Director George Henley, whose office is located at Respondent's headquarters in downtown Chicago, met with each of the four quality control analysts in individual meetings or interviews in Breedlove's office. The purpose of the interviews, according to Henley, was to communicate to the employees the Respondent's position against union representation and to "gain information" from the employees so that Respondent would be "successful" in having the employees reject the Union (Tr. 800-803, 848). A more detailed discussion of those individual meetings follows later in this decision because the General Counsel alleges that, in these interviews, Henley engaged in coercive and unlawful interrogations.

After the individual meetings, the quality control analysts contacted Local 681, which already represented some of the Thornton employees, as a possible alternative to the Union, and they also signed cards authorizing Local 681 to represent them. In an apparent

reference to previous visits by both unions to the quality control lab in attempts to enlist employee support, on April 19, 2007, Henley wrote letters to representatives of both unions, making clear that Respondent would not permit either union to have access to its property in order to meet with the quality control analysts.

On April 30, 2007, Local 681 filed a petition with the Board's Chicago regional office seeking an election among the quality control analysts. One day later, on May 1, 2007, the Union filed a similar petition. A stipulated election agreement was approved on May 31, 2007, and an election was scheduled to be held on June 29, 2007. Prior to the election, the Respondent held three sets of meetings—one for each shift—with the quality control analysts to set forth its position that the analysts should reject any union representation in the election.⁴

The first set of meetings was held on June 6, 2007 in the conference center, a building located a couple of hundred feet from the quality control lab. The management representatives in attendance were Breedlove and Henley, as well as Mike Gaglione, Respondent's vice-president of operations, and Brian Rice. The second set of meetings was held on June 13 (for the first shift) and 14 (for the second shift), 2007, again at the conference center. Henley was not present for those meetings, but Breedlove and Bernie Townsend were present for management. The last set of meetings, one for each shift, took place on June 20, 2007, again at the conference center. At this meeting, Breedlove and Henley were present, as were Director of Labor Relations Rob Reinhold and another management official, Maureen Moore. There was one other set of meetings scheduled for June 27, but it was cancelled and not held because of the discharges of Stroud and Modieh surrounding the events of that day. A more detailed discussion of the content of the meetings will follow later in this decision because the General Counsel alleges that some of the remarks made by management officials at these meetings constituted violations of the Act.

The Election

The election was held as scheduled on June 29, 2007. Stroud and Modieh, who had been discharged the day before, came to the Thornton facility on the day of the election and voted challenged ballots. Stroud was the observer for the Union and Modieh was the observer for Local 681. As indicated above, one vote was cast for the Union and one vote was cast for no union, thus making the challenged ballots outcome determinative. If the discharges were unlawful, as the General Counsel alleges, their votes must be counted; if the discharges were lawful, as Respondent contends, their votes will not be counted and no union would have gained a majority. A more complete discussion of the discharges and the circumstances surrounding the discharges is set forth below.

⁴ I believe that the June meetings were in sets of two, one for each shift, in accordance with the testimony of the management representatives who arranged the meetings. I think the employees who testified that at least one of the meetings involved all 4 quality control analysts were mistaken.

The Section 8(a)(1) Allegations⁵

Paragraph V(a)—“In about mid-March 2007, Respondent, by George Henley . . . interrogated its employees about their union activities and sympathies.”

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The Facts

At some point, after the Union contacted Respondent’s president and requested recognition on the basis of the signed authorization cards from all 4 quality control analysts in early March, Respondent called all of the analysts into Superintendent Breedlove’s office for individual and separate interviews, where they were questioned by Human Resources Manager Henley. Breedlove’s office was located at some distance from the quality control lab. As indicated above, Henley testified that the purpose of these interviews was to “gain information” to help Respondent convince the employees to reject representation by the Union. Henley did most of the talking and Breedlove took notes.⁶

The employees were told that Respondent had received a demand for recognition from Local 150, based on the cards they had signed.⁷ According to Henley, he initially reviewed “the Hanson non union preference statement,” an apparent reference to language in the Hanson North America Benefits, Policy and Procedures Summary that included a statement that the company “will aggressively strive to retain our non-union status and maintain a direct relationship at all times between management and the employees.” Tr. 801, C.P. Exh. 1. He then asked the employees a series of questions. According to Breedlove, Henley asked the employees “numerous questions” such as “what they liked about their jobs, what they disliked about their jobs, if they had heard of the organizing campaign going on in the QC Lab, if they had any concerns about it. If they had heard of the election going on internally within Local 150 that was going on at the time.” Tr. 406. Henley testified he asked “probably five or six questions.” Tr. 801. Stroud was the first employee called into Breedlove’s office; his interview took about 35-40 minutes, according to Henley. Modieh was next, followed by the 2 second shift employees; their interviews took about 20 minutes each, again according to Henley.

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Among the questions asked, according to the uncontradicted and credible testimony of Stroud and Modieh, was why the employees chose Local 150 to represent them. They answered that they thought Local 150 could obtain better benefits for them, to which Henley replied that Respondent already had good benefits.⁸

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⁵ The subsections discussed herein are pegged to the relevant paragraphs in the amended complaint.

⁶ Both Stroud and Modieh testified that Breedlove was taking notes. This testimony is uncontradicted.

⁷ This finding is based on the specific testimony of Stroud and Modieh, which was not contradicted by Breedlove and Henley, whose testimony about the questioning was more general and not as detailed as that of Stroud and Modieh. It is also likely that the recognition demand was mentioned at the outset of the questioning because, after all, that is what prompted the interviews.

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⁸ The above is based on the uncontradicted testimony of Stroud and Modieh. Both
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Stroud's interview began with a statement by Henley about the Union's request for recognition. Henley first brought up Local 150. According to Breedlove, at some point during the questioning of Stroud, but not before the interview began, Stroud expressed concerns about possible discipline for attempting to organize the employees. Henley and Breedlove told him that there would be no such discipline. There is no evidence that this issue was raised in any of the other interviews or that similar assurances were given to other employees. During the course of the questioning, Stroud and Modieh stated that they had signed cards for Local 150 and Stroud stated that he had spearheaded the effort on behalf of Local 150.⁹ Either Henley or Breedlove also gave the employees the Union's website address so that they could learn about a pending internal union election in Local 150.¹⁰

Analysis

The test of the lawfulness of an interrogation is whether, under all the circumstances, the questioning reasonably tends to restrain, coerce or interfere with

Breedlove and Henley denied that the employees were asked whether the employees had signed union cards or supported union representation, but they were not asked whether Henley asked why the employees chose the Union and thus they did not specifically deny the testimony of Stroud and Modieh that Henley did ask that question. My findings in this respect are also supported by the specificity of the testimony of Stroud and Modieh and the generality of the testimony of Henley and Breedlove on these points.

⁹ I reject any contention that the employees "volunteered" their support of the Union or anything else during the interviews. The notion that they volunteered anything during the interviews was based on answers to leading questions. The context of the interviews, particularly Henley's purpose, that is, to "gain information" from the employees, makes it clear that any response or information provided by the employees was in response to Henley's questions.

¹⁰ The above is based on the composite testimony of Stroud, Modieh, Breedlove and Henley. Where appropriate I have made specific credibility determinations. Two other conflicts are presented. One conflict is whether Henley suggested that the employees contact Local 681 as an alternative to Local 150, as Modieh and Stroud testified. Henley denied even mentioning Local 681. But his testimony in this respect was not corroborated by Breedlove, who testified that Henley asked the employees if "Local 681 had approached them at all." Tr. 468. I believe the mutually corroborative testimony of Modieh and Stroud on this issue, not only because of the inconsistency in the testimony of the management officials, but also because the employees initially contacted only Local 150 and the interviews dealt only with Local 150. It is unlikely, in my view, that the employees would have, on their own, contacted Local 681, without some suggestion from the management officials, who, in the interviews, clearly argued for rejection of Local 150, even to the point of telling employees about an internal election in that union. At the very least, the employees left the interviews with the clear impression that sticking with Local 150 would be contrary to the Respondent's wishes and it would be more palatable to the Respondent if they went with Local 681. The other conflict is whether the interviews took place in March, as Modieh and Stroud testified, or on April 11, as Breedlove and Henley testified. I do not believe the specific date of the interviews is significant. It is obvious from the testimony and its context that the interviews took place after the Respondent received the request from Local 150 for recognition in early March, and before the April 19 letters from Henley to Local 150 and Local 681, which objectively established that both unions, not just Local 150, were involved.

employees in the exercise of their Section 7 right to align themselves with a union. See *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 959 (2004); and *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 708 (2005). Some of the relevant factors to be considered in evaluating the lawfulness of an interrogation include the background of the questioning; the nature of the information sought; the identity of the questioner; and the place and method of the interrogation. Obviously, each case turns on its own facts and the factors set forth above are not to be mechanically applied. *Rossmore House*, 269 NLRB 1176, 1178 n. 20 (1984), *aff'd sub. nom., Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), citing *Bourne v. NLRB*, 332 F.2d 47 (2nd Cir. 1964). See also *Multi-Ad Services v. NLRB*, 255 F.3d 363, 372-373 (7th Cir. 2001), where the Seventh Circuit listed other relevant factors in the analysis, including the duration of the questioning, whether it is repeated, the number of workers involved, whether the interrogated worker feels constrained to lie or give noncommittal answers and whether the questioning is accompanied by assurances against reprisal. In that case, the Court, citing one of its earlier decisions, stated that “an employer may not probe directly or indirectly into an employee’s reasons for supporting a union,” and upheld as unlawful the interrogation of a single employee by two managers in one of the manager’s offices as to “why he would want to bring a union into the company.”

Applying those principles to the facts in this case, I find that the questioning in the interviews in this case reasonably tended to restrain, coerce or interfere with employees in the exercise of their rights. The employees were questioned individually in the office of the highest official at the Thornton facility, and in his presence, by the Respondent’s Human Resources Manager, whose offices were in downtown Chicago and who only infrequently came to the Thornton facility. The office was at some distance from the lab where the employees worked. The setting was formal and intimidating, especially in view of Henley’s recitation of Respondent’s anti-union preference statement. Nor was there a legitimate reason for the interviews. Respondent already knew that all the employees had signed authorization cards on behalf of Local 150 and that that union had asked for recognition. But Henley admittedly sought to “gain information” that would be useful in persuading the employees to reject the Union. He asked the employees five or six questions, including why the employees chose the Union to represent them, whether they had any concerns about the union campaign and what they liked or disliked about their jobs. Such questioning clearly comes within the Seventh Circuit’s proscription against probing that “directly or indirectly” seeks an “employee’s reasons for supporting a union.”

Moreover, in context, asking employees what they liked or disliked about their jobs, in connection with questions as to why they chose a union to represent them, adds a coercive element to the interviews. The responses of Stroud and Modieh as to why they selected the Union brought into play employee benefits. The management officials present certainly had the authority to grant or effectively recommend benefits so that the employees would “like” their jobs better and perhaps reject the Union; indeed, one of them took notes while the other did the questioning.

Another clear indication of the coercive nature of the interviews is that Stroud, the first employee interviewed, expressed his concern that he would be disciplined for his union activities. He was given an assurance that he would not be disciplined, although that assurance was not given at the beginning of the interview, was only given in response to his expression of concern, and did not also include an assurance against reprisal for what he

said during the interview. Even if this assurance is considered a factor against finding the questioning of Stroud unlawful, however, there is no evidence that similar assurances were given to Modieh or the other employees interviewed.

5 That the interviews were systematic, extended in duration and involved the entire unit also supports the finding of a violation. Employees, who are only rarely called to the superintendent's office, and, even more rarely, for interviews with the human resources manager, could not, and, in this case, did not, miss the meaning of Respondent's
10 interrogations. They were ordered to report to the locus of authority in order to "gain information" about the depth of their union support. And, as a result of Respondent's questioning in those interviews, the employees undertook to contact another union, which they thought would be more palatable to their employer.

15 In these circumstances, and considering all of the factors discussed above, I find that the Respondent's questioning during individual interviews of the employees was unlawful and violative of Section 8(a)(1) of the Act. See *Multi-Ad Services v. NLRB*, supra.¹¹

20 Paragraph V(b)—On June 6, 2007, George Henley orally promulgated and thereafter Respondent maintained a rule prohibiting employees from wearing union attire to work, threatened discipline for violating that rule, and threatened employees with layoffs if they selected a union as their bargaining representative.

25 At the outset of the June 6 meetings, George Henley distributed an NLRB publication about employee rights (A Guide to Basic Law and Procedures under the National Labor Relations Act) and spoke to the employees about its contents. He made it clear to the employees that the Respondent did not want them to vote for union
30 representation in the election. He also told the employees that he had sent letters to both the Union and Local 681, telling their officials that they could not visit the employees at the lab during the organizational campaign. In explaining why he mentioned the letter to the employees, Henley testified that he "felt it was important for [the employees] to know that we wanted their focus to be on doing their jobs. . . . And that we had made a decision that
35 the unions were not going to be allowed to come in and do campaigning during work time." Tr. 806-807.

40 Since early March, the quality control employees, particularly Stroud, but, to a lesser extent, Modieh, had worn Union t-shirts and caps, carrying the Local 150 logo, at work. Until June 6, no supervisor or manager had said anything about the union attire. But, according to the testimony of Stroud and Modieh, at the June 6 meeting they attended, Henley stated that the employees could not wear union clothing, t-shirts or caps to work and they would be disciplined if they did so thereafter. According to Stroud, he was
45 wearing a union t-shirt at this very meeting. He also testified that he continued wearing at least a Union cap at work after this meeting, until during the following week, when his supervisor confiscated it. That incident is discussed more fully later in this decision, as it is

50 ¹¹ The systematic and pervasive questioning in this case is factually distinguishable from the limited questioning in the cases cited by Respondent (R. Br. 8-9), in which no violation was found.

alleged as a separate unfair labor practice. Stroud and Modieh also testified that Henley said that “unions lay people off,” and, if they voted for a union, the employees, who were normally retained during the winter slow season, “could get laid off.” Tr. 38, 170.

5 Henley denied that he said anything at the June 6 meetings about any prohibition against wearing union attire, including any discipline of employees for wearing such attire, or anything at all about layoffs. Breedlove, who attended these meetings, corroborated Henley in these denials. In fact, Henley testified, the Respondent had no rule or policy
10 prohibiting the wearing of union insignia at the Thornton facility and employees frequently wore such insignia, testimony that was corroborated by Breedlove.

15 I cannot accept the testimony of Stroud and Modieh on either issue. As to the alleged prohibition against wearing union attire, I note that Stroud continued to wear at least his Union cap for another week after Henley’s alleged prohibition.¹² Nor was he disciplined for doing so, contrary to Henley’s alleged threat of disciplinary action, even though his cap was confiscated by his supervisor. I believe that the confiscation of Stroud’s Union cap—discussed below, in connection with paragraph V(e) of the complaint—was a
20 separate, isolated incident that does not support a finding that Henley orally promulgated an anti-union apparel rule on June 6. Nothing in Stroud’s testimony about the confiscation of his cap suggests that it was in any way connected with Henley’s alleged promulgation of an anti-union apparel rule. Nor does any other evidence support the promulgation or enforcement of such a rule. The fact that Respondent did nothing else to enforce such a
25 rule militates against a finding that such a rule was promulgated. Moreover, the General Counsel did not unearth anything else, either in the cross-examination of Breedlove or Henley or in any other respect, which would support the testimony of Stroud and Modieh on this matter. In these circumstances, it seems implausible that the Respondent would have permitted the wearing of union t-shirts and caps from March until early June, as it
30 did, and then, all of a sudden, in the June 6 meeting, prohibit the wearing of this attire. Accordingly, I will dismiss all allegations in the complaint regarding the oral promulgation and enforcement of a rule prohibiting the wearing of union attire in the lab.

35 Nor can I accept the testimony that accuses Henley of threatening layoffs of the quality control analysts during the slow season, if they selected a union. It is possible that someone at the June 6 meeting said something that led Stroud and Modieh to believe that something was said about layoffs during the slow season. But, aside from the conclusory
40 testimony of Stroud and Modieh, the General Counsel failed to show an objective basis for such belief. Nothing else in this record supports a finding that Henley, a knowledgeable personnel manager, who had just read from an official NLRB publication about the rights of employees and supervisors in a union campaign, would make such a blatant threat. I do not believe he did. But, even considering the evidence in the best light for the General
45 Counsel, the testimony on this issue would be in equipoise and the General Counsel has the burden of proving that his witnesses are more believable than the Respondent’s witnesses. On this issue, the General Counsel has not met his burden. I therefore dismiss the

50 ¹² On direct examination, Stroud was asked if, after the June 6 meeting ended, he ever wore any union shirts or hats to work again. He answered, “Yes, I did.” Tr. 170.

complaint allegation that Henley threatened layoffs during the slow season if the quality control analysts selected a union in the upcoming election.

5 Paragraph V(c)—In early to mid-June 2007, George Henley orally promulgated a rule prohibiting employees from posting union material on its bulletin boards; thereafter, Respondent maintained such a rule and selectively and disparately permitted non-union literature to be posted on its bulletin boards.

10 Stroud testified that, previous to the June 6 meeting, he had posted union stickers that stated “vote yes” for Local 150 on the bulletin board in the lab. At the June 6 meeting, according to Stroud, Henley said that all union stickers had to come down. The reason given was that, “this was company property.” Tr. 167. Stroud asked if other posters, unrelated to unions, also had to be removed from the bulletin board; and Henley said that the latter could remain posted. Stroud also asked Henley whether there would be any disciplinary action taken if the union posters were not removed and Henley said, “yes.” Tr. 15 169. It is not clear from Stroud’s testimony whether he actually removed any union stickers; he merely testified that, by virtue of Henley’s statement at the June 6 meeting, Henley “made us take them down.” Tr. 167. Modieh testified that Henley told the employees at the June 13 meeting that union stickers would have to be removed. He did not testify that anything was said about discipline for continuing to keep the stickers posted, but he did testify that he removed a Local 150 sticker “the next day.” Tr. 46-48, 87, 20 104. The major problem with Modieh’s testimony is that Henley was on vacation and did not appear or speak at the June 13 meeting. Indeed, Stroud specifically denied that Henley was present at the June 13 meeting. In these circumstances, I do not find Modieh’s testimony reliable on this issue and I cannot rely on it in making findings of fact. 25

30 Henley testified that Respondent did not have a written policy regarding the use of bulletin boards at the Thornton facility, but that there was a provision in the hourly manual about placing or removing material from company bulletin boards without permission. That manual applied only to union represented employees, but Henley testified that even the manual rule on bulletin boards was not strictly enforced. He denied that he said anything at the June 6 meeting or at any other meeting about the posting of union related material on the bulletin board in the lab. Breedlove corroborated Henley on these matters. 35

40 I cannot accept Stroud’s testimony that, at the June 6 meeting, Henley prohibited union-related items from being posted on the bulletin board in the lab. He was not supported in his testimony by Modieh, who testified the prohibition was promulgated at a meeting Henley did not attend, and did not mention a threat to discipline offenders. This conflict in testimony makes it difficult to make any reliable findings on the alleged promulgation of such a rule. I credit instead Henley’s denial, corroborated by Breedlove, 45 that anything was said about employees placing union-related items on the bulletin board in the lab at the June 6 meeting. This view is supported by Respondent’s failure to strictly adhere to another policy against the posting of material on bulletin boards by other unions who represented employees at the facility. I do not believe that Respondent really cared about union posters or stickers on the lab’s bulletin boards. No other evidence indicates as much. Stroud’s testimony also conflicts with Modieh’s as to when the stickers were taken 50 down. Modieh testified that he took them down after the June 13 meeting; Stroud testified

that someone whom he did not name, not he, took the stickers down after the June 6 meeting. In these circumstances, I cannot make a finding that the alleged rule against the posting of union stickers was actually enforced, making it unlikely that such a rule was ever promulgated. Accordingly, I will dismiss the allegation in paragraph V(c) of the complaint.

Paragraph V(d)—At the June 6, 2007 meeting, Vice-President Mike Gaglione promised employees that they would receive promotions to management positions if the employees rejected union representation and told them that it would be futile to select a union because the facility “was going to stay non-union because it has always been that way.”

To support this aspect of the complaint, the General Counsel again relies on the testimony of Stroud and Modieh. Although these witnesses testified more fully about other remarks made at the June 6 meeting they attended, their testimony about what Gaglione said was quite limited. Modieh testified that Gaglione said he “strongly advises” the employees to vote non-union and that, if the employees selected a union, the relationship between the quality control analysts and the foremen would be “jeopardized.” Tr. 39-40. Stroud testified that Gaglione told the employees about his experiences at Respondent, “work[ing] his way up through the ranks.” According to Stroud, Gaglione said that the lab had always been non-union and “it’s going to remain a non-union shop.” Tr. 165. According to Stroud, Gaglione also “gave a demonstration on how a quality control analyst was promoted out of quality control and moved on to becoming a foreman.” Tr. 165. Gaglione testified that he told the employees about his experiences over 47 years with Respondent in working with the quality control people. He told them that, in his view, it was better for those employees to remain non-union because their work would go more smoothly that way. He also said that the quality control people were really an extension of management, particularly in their contact with customers. He denied that he said anything about quality control people being promoted to management positions if they voted non-union or anything about the lab always being non-union and it would be futile to vote for a union. His denials were supported by Breedlove and Henley, who also attended this meeting. On cross-examination, however, Gaglione admitted that he told the employees that the lab had always been non-union as long as he had been with Respondent and that he said something to the effect that the quality control position is a good place from which to advance to a management position.

Except for Stroud’s testimony that Gaglione said that the quality control lab was “going to remain a non-union shop,” nothing in the testimony of any of the witnesses even remotely supports the General Counsel’s complaint allegations that Gaglione stated that it would be futile to select a union. The thrust of that other testimony was that Gaglione told the employees that the lab had always been non-union and that he thought the jobs in the lab were more appropriately non-union. This does not amount to a statement that it would be futile to select a union or that the Respondent would never deal with a union. Even Stroud conceded that Gaglione’s statement that the lab would always be non-union was made in the context of Gaglione’s other statements that reflected his own experience and his view that the lab employees would more appropriately fit as non-union personnel. Nothing in Stroud’s testimony indicates that Gaglione said anything about Respondent refusing to bargain in good faith if the employees chose a union. I cannot make the inference—simply from Stroud’s testimony—that Gaglione’s statements in this respect

violated the Act. Not only is there no evidence that the Respondent stated that it would do anything unlawful to keep a union out, but the Respondent had dealt successfully with unions both at the Thornton facility and with respect to other quality control employees at other locations. Furthermore, Stroud testified that, earlier in this very meeting, Henley
 5 had set forth general principles of NLRB law that included a statement that “the company does not have to ever accept a union contract as long as they’re bargaining in good faith.” Tr. 165. That, of course, is an accurate statement of the law. In these circumstances, I cannot find that Gaglione violated the Act by telling employees that it would be futile to
 10 select a union because Respondent would resist unionization by other than lawful means. See *Ready Mix, Inc.*, 337 NLRB 1189, 1190 (2002); and *Winkle Bus Company*, 347 NLRB No. 108, slip op. at 3-4 (2006).

Nor does anything in the testimony of any of the witnesses on this aspect of the case
 15 support a finding that Gaglione promised the employees promotions if they rejected the Union. He made no specific connection between promotions and the outcome of the union election. Such an inference is not sustainable simply from the testimony that he may have mentioned that the quality control analyst position was, in his view, similar to a
 20 management position and a good vehicle for movement into a management position, a point that followed from his description of his own career. Nor is a violation established simply because Gaglione may have mentioned the name of a particular employee who had moved from a quality control position to a management position. In these circumstances, I find that the General Counsel has not proved by a preponderance of the evidence that Gaglione
 25 promised that the employees would be promoted to a management position if they rejected a union. Accordingly, I shall dismiss all the allegations in paragraph V(d) of the complaint.

Paragraph V(e)—In early to mid-June 2007, Chris Pronoitis “made an effort to prevent . . .
 30 employees from wearing union hats at work by physically removing and confiscating hats in their possession.”

This complaint allegation involves an incident that is best described in the following
 35 testimony of Greg Stroud, augmented in part by that of Modieh. Stroud had been wearing a Union cap, with the Local 150 logo on it, to work from early March. He continued to wear it until shortly before the June 13 meeting. On that day, his supervisor, Chris Pronoitis, approached him in the lab and told him to remove the Union cap. When Stroud did so, Pronoitis took the cap away from him. Pronoitis then went to the water cooler,
 40 where another Union cap had been placed. Pronoitis took that cap as well. According to Modieh, who was not present during the Stroud/Pronoitis encounter, he had worn this second cap a “couple of times” before, and subsequently had placed it either on or behind the water cooler. After Pronoitis took both Union caps, he left the lab with them. Neither
 45 Stroud nor Modieh ever saw those caps again.

Pronoitis also testified about this incident, although he said it occurred on June 20 and that he took only one cap, the one at the water cooler. According to Pronoitis, Stroud initiated the conversation about the Union cap. He testified that Stroud said that he had no
 50 use for the cap and asked if Pronoitis wanted it. Pronoitis said he did not, but, after Stroud mentioned that another supervisor might be interested in it, Pronoitis agreed to take the cap and give it to the other supervisor. According to Pronoitis, he left the lab with

that cap, only one cap, and gave it to the other supervisor later that day. He claimed that he did not confiscate the cap, but rather Stroud gave it to him

I credit the testimony of Stroud over that of Pronoitis on this aspect of the case. Stroud's testimony was clear and direct and held together as a coherent story. Pronoitis's account strains credulity, particularly in view of Respondent's opposition to the Union in the campaign. I cannot believe that Stroud initiated the discussion about the apparently discarded Union cap and offered it to Pronoitis. Also implausible is Pronoitis's testimony that Stroud then asked his supervisor, the second highest official at the quarry (Tr. 708), to deliver the Union cap to another supervisor at another section of the facility. In these circumstances, I reject Pronoitis's testimony and believe instead that of Stroud.

In accordance with my credibility determination set forth above, I find that Pronoitis confiscated the Union cap that Stroud was wearing, as well as another Union cap, and never returned them. He did so without reason. Nor were special circumstances pleaded to justify the actions of Pronoitis. Accordingly, I find that such conduct was coercive and violative of Section 8(a)(1) of the Act. See *NRC Corp.*, 313 NLRB 574, 577 (1993); *Wal-Mart Stores, Inc.*, 350 NLRB No. 71, slip op. at 6 (2007); and *Brandeis Machinery & Supply Co.*, 342 NLRB 530 (2004).

Paragraph V(f)—Promises and Expressions That it Would be Futile to Select a Union by Robert Reinhold

At the June 20 meetings, one for each of the two shifts, Hanson North America Labor Relations Manager Robert Reinhold, who is stationed in New Jersey, spoke to the quality control analysts. He set forth the Respondent's position against union representation. As part of his remarks, which were essentially the same in both meetings, he distributed a handout to the employees, which was in the format of a power point presentation. Although he deviated at times from the handout, he testified that he generally followed the statements in the handout and had notes on his copy of the handout to guide him. He denied that he promised a raise of \$3 per hour to the employees for voting against a union or that he informed the employees that it would be futile to select a union because Respondent would stall contract negotiations, as alleged in the complaint. Indeed, he testified that he told employees exactly the opposite. He told them that Respondent could not lawfully promise that, for example, the employees would receive raises if they rejected a union, but that a union could make promises that it could get them such raises. He told employees that the law prohibited such promises because employers had the power to carry them out and to permit such promises would effectively preclude the fair election of a union. He also said he could not predict what would happen in collective bargaining, which might quickly result in a bargaining agreement or might take a long time. He gave the example of bargaining at a Hanson facility in Pennsylvania between the company and an Operating Engineers local, which he knew about from personal experience and which was documented in his handout. The parties had bargained to impasse, and, even though unfair labor practice charges and a decertification petition had been filed, there was still no contract three years after the employees selected the Operating Engineers to represent them. Reinhold's testimony is corroborated by the handout, including his notes, which was admitted in evidence, as well as the testimony of Henley and Breedhove, who were present at the meeting and denied that he made the statements alleged in the complaint.

In support of the allegations in paragraph V(f) of the complaint, the General Counsel relies primarily on the testimony of Stroud and Modieh. As to the allegation that the Respondent would stall negotiations and render choice of a union futile, Modieh and Stroud simply confirmed Reinhold's more detailed and reliable testimony about the Pennsylvania bargaining example mentioned in his handout. I do not believe their testimony fairly suggests that Reinhold said that Respondent would stall negotiations if the quality control employees chose a union to represent them. To the extent that their accounts differ from that of Reinhold, however, I find that they may have read more into Reinhold's example as to what happened during previous negotiations at one of Respondent's operations in Pennsylvania than what was actually said. But that does not mean that Reinhold made statements to the effect that the Respondent would stall negotiations so as to render choice of a union futile. I find, in accordance with Reinhold's more reliable, detailed and corroborated testimony, that he did not. I do not believe that a labor relations expert with Reinhold's experience would have deviated so radically from the example he used in the handout as to what happened during a previous negotiation at one of Respondent's operations in Pennsylvania.

As to the allegation that Reinhold promised the employees that they would receive a \$3 per hour raise if they rejected the Union, the General Counsel again relies on the testimony of Modieh and Stroud, which, in my view, was conclusory and lacked the detail and context of Reinhold's account. I do not believe Reinhold promised the employees a \$3 raise if they rejected the Union. I find instead, in accordance with Reinhold's more reliable testimony, that he told the employees that, unlike a union, Respondent could not lawfully promise the employees a raise. Indeed, the handout distributed by Reinhold states that Respondent "can not tell you what will happen to your wages . . . if you chose to represented (sic) by the Union." I cannot believe that Reinhold, an experienced labor relations professional, would have deviated so radically from the handout as to have made the bald promise set forth in the testimony of Stroud and Modieh. In these circumstances, I find that the General Counsel has not established the violations alleged in paragraph V(f) of the complaint and those allegations of the complaint are dismissed.

Paragraph V(g)—On June 20, 2007, Henley promised that employees "would receive promotions to management positions if the Union lost the election."

On this aspect of the complaint, the General Counsel relies only on the testimony of Modieh, who testified that, in the June 20 meeting, Henley said that, in the past, a quality control technician had moved up to a foreman's position and that could happen to the present quality control analysts if they voted against a union. Stroud, who testified about Reinhold's remarks at this meeting, did not testify that Henley said anything at all during the June 20 meeting, except to introduce Reinhold. Henley testified that, at this meeting, he simply made some introductory remarks to introduce the main speaker, Reinhold, who had flown into Chicago from New Jersey specifically for the meeting. He denied that anything was said by any management representative about employees being promoted to management positions if they voted against a union. That denial was echoed by Breedlove, who also attended the June 20 meeting.

I find more reliable the testimony of Henley and Breedlove that Henley did not make the remarks attributed to him by Modieh. Not only did Modieh's conclusory testimony lack context, but it was not corroborated by Stroud, who also attended the meeting. It is possible that Modieh confused his testimony about Gaglione's remarks at the June 6 meeting with the remarks he attributed to Henley at the June 20 meeting. But that confusion does not inspire confidence in the reliability of the testimony of Modieh about either meeting. Nor is it plausible that Henley would have so explicitly tied the probable promotion of all the quality control analysts to rejection of a union. Who would do the quality control work if they were all promoted outside the unit? In these circumstances, I find that the General Counsel has failed to establish the violation alleged in this part of the complaint and I dismiss that allegation.

The Amendment—The Alleged *Johnnie's Poultry* violation by Attorney Alex Barbour

On the last day of the hearing, the General Counsel moved to amend the complaint by alleging a violation of Section 8(a)(1) of the Act because of the failure of Respondent's lead counsel, Alex Barbour, to adhere to the *Johnnie's Poultry* requirements for the interview of prospective witnesses.¹³ The amendment was sought as a result of the testimony of employee Ed Mecnas concerning an affidavit he gave to Barbour in connection with the preparation of his testimony in this case. Barbour objected to the motion, as to which I reserved ruling, and made an offer of proof as to what he said to Mecnas before he took the affidavit. I grant the motion to amend, but, as shown below, I dismiss the allegation.

Second shift quality control analyst Ed Mecnas was called by Respondent to testify mainly on the just and proper issue in the injunction proceeding. But he was also asked questions about some of the Section 8(a)(1) allegations in the complaint. He was asked, for example, whether, in the June meetings that he attended, management officials had ever promised raises or promotions if the employees voted against a union, told them that Respondent would stall union negotiations and never reach an agreement, told them that employees would be laid off during the slow season or otherwise made promises or threats. He denied that they had. It became clear to me, after his cross-examination, that Mecnas had no clear recollection of what was said at these meetings, particularly when he was asked to detail what was said, by whom and when. Moreover, contrary to the testimony of Respondent's management witnesses, Mecnas testified that all the June meetings involved all four of the quality control analysts. But it is clear from the overall testimony in this case that at least two of the meetings, and probably all three, were split meetings, one for each shift. Thus, Mecnas could not have credibly testified about what was said in the meetings with the first shift employees, which is what formed the basis of the General Counsel's allegations.

When I mentioned on the record that I found Mecnas's testimony about the meetings unreliable because of his repeated expressions of lack of recollection, Respondent's counsel sought to introduce Mecnas's pre-trial affidavit into evidence. See R. Exh. 13. The General Counsel objected, but I reserved ruling on its admissibility,

¹³ See *Johnnie's Poultry*, 146 NLRB 770, 774-775 (1964), enforcement denied, 344 F. 2d 617 (8th Cir. 1965).

5 permitting the parties to brief the matter, including what weight, if any, to give the affidavit. I will admit the affidavit in evidence, in view of the attack on Macenas's credibility and his lack of recollection on the witness stand as to what took place at the meetings. The document is at the very least an example of past recollection recorded. Rule 803(5) of the Federal Rules of Evidence; see also Rule 807.

10 Consideration of the affidavit, which supports Macenas's denials that any of the alleged unlawful statements were made during the meetings that he himself attended, does not change my view that Macenas's denials are unreliable. I have no reason to believe that the affidavit overcomes Macenas's testimony at the hearing, which, as I have stated, was riddled with expressions of lack of recollection. It was taken in late October, months after the June meetings. Moreover, I have to evaluate Macenas's overall testimony, not just his affidavit, which, as I have stated, could not address what was said in the meetings that 15 Stroud and Modieh attended and that Macenas did not attend. Not only did Macenas's testimony lack context, but his lack of recollection throughout his testimony does not inspire confidence. Nor was I impressed with his demeanor, which led me to believe he did not take his testimony seriously. Indeed, at the end of his stint on the witness stand, I asked Macenas whether he could remember anything that was said at the June meetings. He 20 replied, "Not really. I took them with a grain of salt." Tr. 779. Thus, I do not credit any of his testimony about the June meetings with management officials; and, because of that credibility determination, I doubt the reliability of any of his testimony, including that discussed more fully below, which spawned the motion to amend the complaint.¹⁴

25 In the course of my questioning of Macenas about the taking of his affidavit, Macenas initially testified that attorney Barbour did not say anything to him before asking Macenas the questions that resulted in the taking of his affidavit. Because that testimony apparently raised the issue of whether the *Johnnie's Poultry* assurances had been given, I 30 permitted Respondent's counsel to question Macenas further on what was said to Macenas before the questioning began and the affidavit was taken. As a result of that questioning, Macenas confirmed that he signed statements, prior to the questioning and the taking of the affidavit, indicating that he had been given assurances by Barbour that no reprisals 35 would be taken against him for the answers given to his questions, that the questions were to aid Barbour's preparation for the trial and that Macenas's participation in the questioning was voluntary. See R. Exhs. 14 & 15. Although I reserved ruling on the admissibility of those statements at the hearing, I now rule that they are admissible, for the same reasons I gave for the admissibility of Macenas's affidavit. Not only was Macenas's 40 testimony about the preliminaries to Barbour's questioning subject to the same lack of recollection as his other testimony, but he specifically stated that he could not "recall" what was stated before the questioning began. Tr. 776. Unlike the situation presented with respect to Macenas's affidavit, however, I tend to believe that the written statements signed 45 by Macenas with respect to Barbour's assurances are a better and more reliable indicator of what happened than his testimony in response to my questioning. Macenas's testimony

50 ¹⁴ The other second shift quality control analyst, Chuck Breslin, exhibited a similar lack of recollection of the specifics as to what was said during the June meetings. Accordingly, I find his testimony in this respect similarly unreliable.

on this matter was, as mentioned below, confusing and showed a lack of understanding of the questions asked.

Indeed, even without considering the written statements, I find that the relevant evidence, based solely on Macenas's testimony, does not establish a *Johnnie's Poultry* violation. Not only was Macenas a generally unreliable witness, but I believe he was confused when I asked him whether Barbour said anything to him before he gave his affidavit. I do not think Macenas really knew what he was saying—or, indeed, what was being asked—when he answered my question by saying, “no.” Tr. 775. That exchange, together with related testimony following that exchange, is too slender a reed upon which to base any significant finding of fact, much less a finding of a violation of the Act. Macenas was simply not credible or reliable when testifying about what Barbour told him before Barbour took his affidavit. Nor was the matter elaborated upon further by the General Counsel, who, after all, has the burden of proof on the issue. For those reasons, I cannot find that the General Counsel proved by a preponderance of the evidence that Barbour did not give Macenas the *Johnnie's Poultry* assurances before taking Macenas's affidavit. In these circumstances, I shall dismiss the allegation that Respondent violated the Act as alleged in the amendment to the complaint.

The Section 8(a)(3) Allegation that Respondent discharged employees Stroud and Modieh for discriminatory reasons.

The Facts

On June 20, 2007, Quality Control Engineer John Barthel was filling in for his associate, Randy Polaczek, at the Thornton lab because the latter was on vacation. Barthel, who had once been a quality control technician at Thornton, was working in the office that adjoins the lab where the testing is done. He was there from about 7 a.m. until about 12 noon or 12:15 p.m. Barthel testified that, at about 10:15 a.m., some Indiana inspectors arrived at the lab. Stroud, Modieh and Barthel accompanied them as they toured the quarry. After the inspectors left at about 11:15 or 11:30 a.m., Stroud, Modieh and Barthel returned to the lab; shortly thereafter, Stroud and Modieh left in a truck and returned at about noon with their lunch, which they then ate. At about this time, Barthel checked the log book in the lab and noticed that the book reflected that ten samples had been tested that morning, with no time noted as to when the test samples were collected. All were full tests, which, in total, would have taken some six or eight hours to run, according to Barthel. Yet, also according to Barthel, who was probably the most credible witness in this proceeding and impressed me as totally honest and without guile, he observed and heard no testing being performed in the lab that morning. Indeed, he testified that there is no way that the tests recorded in the log book could have been performed that morning.¹⁵

¹⁵ There is no dispute that Modieh made the log entries for the first shift during the relevant time period. They were also clearly identifiable because they were in Modieh's handwriting. It is also undisputed that Modieh and Stroud were jointly responsible for the entries in the log book as well as all of the testing reflected in the log book and in other reports attendant to the testing.

Barthel's testimony is enhanced not only because he knew the technician's job, having performed it in the past, but because any testing in the lab would have been obvious not only to the naked eye, but to the ear. I viewed a video-tape of the testing process, which was admitted in evidence in this proceeding, and I can confirm that it is a noisy and time-consuming process. I am satisfied that Barthel would have seen or heard something if testing had indeed taken place. I am also satisfied that Barthel's observations that morning were not prompted by any supervisory instructions, as he testified, and were noted solely because of his concern that testing was erroneously recorded as being performed when it was not. Barthel credibly testified that it was part of his job at other facilities to check the log book. He thought it was his job to do so at Thornton while he was filling in for his vacationing associate, and he had done so before at Thornton.

Barthel did not report his observations to anyone that day. He decided to wait until Polaczek returned the following Monday, June 25, and report the matter to him because Thornton was Polaczek's yard and Barthel had been substituting for him the week before. He told Polaczek what he had observed the week before. Neither engineer observed or heard any testing on the morning of June 25, although Barthel was not present continuously that morning. Polaczek, who was present for several hours, credibly testified that he did not see or hear any testing that morning. At about 9 a.m., Polaczek looked at the log book and found that it contained notations that 12 tests had been run that morning, including 10 full tests, something that, in his experience, would have been highly unusual. I found Polaczek just as honest, knowledgeable and reliable as Barthel was. Measuring his testimony against the demonstrated noisiness and thoroughness of the testing process, as shown in the exhibit that I viewed, I conclude that he would have heard or observed any testing if indeed it had taken place while he was present in the lab. Polaczek also credibly testified that he was not prompted in any way by management officials to observe Stroud and Modieh on that Monday. He was truthfully testifying as to what he did not see or hear.¹⁶

In any event, sometime later in the day, on Monday, Polaczek reported his and Barthel's observations to Chris Pronoitis, the supervisor of the quality control analysts, who in turn reported what he had heard to Superintendent Breedlove. On Tuesday, June 26, Breedlove had a meeting with Barthel and Polaczek, as well as Pronoitis and Product Quality Director Brian Rice, and it was decided that the next day, Wednesday, June 27, Respondent would station observers at the lab to monitor whether any testing was being done by Stroud and Modieh. Barthel, Pronoitis and Polaczek were to be the observers, on overlapping shifts, to provide continuous monitoring.

On June 27, the observers were present either in the lab itself or in the engineers' office adjacent to the lab, from about 6 a.m. on. Each testified credibly that they did not observe or hear any testing going on while they were present.¹⁷ Pronoitis arrived at about 6 a.m. and stayed until Barthel arrived; Modieh was already present when Pronoitis arrived

¹⁶ To the extent that Stroud and Modieh testified to the contrary—that they performed tests on June 20 and 25 while Barthel and Polaczek were present—I discredit their testimony.

¹⁷ It is clear that no samples are left over from the second shift for the first shift employees to test; they must gather new samples when they arrive at work at 6 a.m.

and Stroud arrived shortly thereafter. Barthel arrived shortly before 7 a.m., while Pronoitis was still at the lab, and remained until about 8 a.m. Polaczek, arrived at the lab at about 8 a.m., while Barthel was still there. At one point during the morning Stroud left the lab to collect samples. On his watch, Polaczek observed Stroud coming into the lab from the field where he had collected buckets containing test samples and placing the buckets on the floor of the lab. According to Polaczek, this was the first time he had observed samples in the lab during his watch. Indeed, Polaczek took a photograph, on his cell phone, of the samples, which remained in their buckets waiting to be tested. The photograph was taken at exactly 9:48 a.m., as shown by the entry on his cell phone. The buckets of samples—five of them—remained in the position reflected in the photograph, without being disturbed, moved or tested as long as Polaczek remained at the lab. Polaczek's testimony is enhanced because he prepared contemporary notations of what happened on his watch and e-mailed them at some point to Breedlove.

Stroud and Modieh left the lab at around 9 a.m. and returned about an hour later. They had gone off the facility to Dunkin' Donuts, for coffee, and afterwards they went to the chip plant on the facility to pick up a sample. While they were gone, Polaczek noticed two gradation reports in the printer connected to the computer in the lab office used by the quality control analysts. The times written on the gradation reports, purportedly stating the times that the tested samples had been collected, were 9:30 and 10 a.m., times that had not yet occurred and times when Stroud and Modieh were away from the lab. At this point, Polaczek called Breedlove, who was in the conference room at a nearby building. Breedlove immediately came to the lab, accompanied by Pronoitis. After they studied the gradation reports, Breedlove and Pronoitis left the lab with the reports or copies of the reports. Polaczek was present at the lab when Stroud and Modieh returned and he observed no further testing until he left at about 11:30 a.m.

At some point on the morning of June 27, after 11 a.m., while Polaczek was still there, Pronoitis returned to the lab and directed Modieh to go out to the field to gather samples of three products that were to be shipped by rail that day. After about 20 minutes, Modieh left the lab to gather the samples; Stroud remained in the lab. When Modieh returned, he began to "split the samples" to begin the testing process. Tr. 719. Pronoitis was talking to Stroud about the upcoming meeting scheduled for that afternoon, which was ultimately cancelled, when he received a call on his cell phone from Breedlove. In the meantime, management had decided to interview Stroud and Modieh about what had happened or not happened that morning, and Breedlove directed Pronoitis to bring Stroud and Modieh to Breedlove's office, which he did by truck. Stroud and Modieh were transported to Breedlove's office shortly after 12:30 p.m.

Stroud and Modieh denied that they had falsified test results or failed to perform tests on the morning of June 27. They insisted they had performed some tests: Stroud estimated that he and Modieh had performed 5 to 7 tests; Modieh testified that they had done at least two, which took about an hour. The log book for June 27 reflects that 10 tests were performed on the first shift (Tr. 734-746, R. Exh. 9a). Those tests had to have been performed before noon because Stroud and Modieh took their lunch at noon and, shortly after their lunch break ended at 12:30, they were escorted to Breedlove's office for their interviews. I reject the testimony of Stroud and Modieh that they performed any tests on the morning of June 27. It is contrary to the credible testimony of the Respondent's

observers and Breedlove, as well as the documentary evidence that supports their testimony, particularly the gradation reports prepared on June 27. Those reports listed times when the samples could not have been collected because, when the reports were seen and taken by management officials, the reports reflected times that had not yet occurred. 5 Moreover, based on all the testimony about the nature of the tests and the time needed to perform them, I believe it would have been impossible for Stroud and Modieh to run 10 tests before noon, which is what the log book indicated. Even in their testimony Stroud and Modieh did not state that they had performed anything close to 10 tests on the morning of June 27. Thus, the notations in the log book on June 27 were also false. In any event, I believe, in accordance with the weight of the evidence on this point, that Stroud and Modieh ran no tests that morning and that Stroud and Modieh falsified test results in the log book and in the gradation reports. Indeed, to the extent that they insisted they did not falsify test results in the past, I reject any such testimony. I believe that they also 15 falsified results for tests that they did not perform on June 20 and June 25, in accordance with the credible testimony of Barthel and Polaczek.

After Polaczek left the lab, he went to Breedlove's office, where he met with Breedlove and several other management officials. The individuals in Breedlove's office participated in a conference call with Respondent's president and other management officials at other locations. Barthel also participated in the conference call. Respondent's president stated that, based on what was reported to him, the employees should be discharged. It was decided, however, to seek explanations from the employees. As a result, 20 Stroud and Modieh were directed to come to Breedlove's office, where they were questioned separately by Henley. They were asked to explain how they could have done any testing during that morning in the face of the times indicated on the gradation reports, as well as the evidence from the observers that no testing was done that morning. Their answers did not exculpate them, in the view of the Respondent's officials. After another 25 conference call with higher management, Stroud and Modieh were suspended and told to return the next day. Henley credibly testified that, during his discussions with Stroud and Modieh, he gave them the opportunity to resign instead of being discharged. They declined the offer. After further investigation, which involved the interview of the second shift 30 quality control analysts, and further deliberation, Stroud and Modieh were discharged the next day, June 28, for falsifying test results that they did not perform. 35

Both sides submitted evidence of allegedly comparable treatment of employees at the Thornton facility. The Respondent submitted evidence that other employees who had 40 similarly falsified documents were discharged or permitted to resign in lieu of discharge. Respondent's examples involved two employees—scale clerks at the Thornton facility—who colluded with truck drivers to falsify the base weight of the truck so that the weight of the loaded truck would be greater, thus increasing the compensation of the trucker. One of 45 the incidents took place in May 2003 and the other in January 2006. After a complete investigation of these matters, the employees were told that they would be discharged if they did not resign and they did resign. Tr. 608-617. The General Counsel submitted documentary evidence that showed several union-represented employees were disciplined but not discharged for falsifying documents. On June 14, 2007, one employee was issued a 50 written warning for being late and documenting that 8 hours were worked, his second offense of this nature (G.C. Exh. 8, Tr. 323-324). On October 4, 2006, another employee was issued a suspension after an investigation showed that he left work "without

performing service on your loader” and made a notation on a report “15 minutes past the actual time you left work.” This may have been the result of a settlement between Respondent and the union involved. Tr. 325-327, G.C. Exh. 9. Still another employee—an electrician—was issued a suspension, on March 31, 2006, pending further investigation, for, on numerous times, falsifying “time sheets for additional pay without time worked.” That employee continued his employment and was later permitted to retire on July 3, 2006. This too was the result of a last chance agreement and a settlement between Respondent and the union involved. Tr. 328-330, G.C. Exhs. 10 & 11. The final document submitted by the General Counsel on this issue involved the discharge of an employee in October of 2006, after a suspension pending investigation of violations of company rules, including 3 violations in a 12 month period. The rule infractions included failing to give advance notice of absences or tardiness, loitering and making unauthorized stops and sleeping during working hours. Tr. 330-333, G.C. Exh. 12. Whatever rules were involved in these warnings and suspensions applied to hourly employees represented by unions and did not specifically apply to the quality control analysts. Tr. 333-340.

Analysis

To sustain a finding of discrimination, the General Counsel must make an initial showing that a substantial or motivating factor in the employer’s decision was the employees’ union or other protected concerted activity. As part of that initial showing, the General Counsel may show that the employer’s reasons were false or pretextual. If the General Counsel has made such an initial showing, the burden of persuasion then shifts to the employer to show that it would have made the same decision, even absent the union or protected activity. See *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003); *Alexandria NE LLC*, 342 NLRB 217, 219 (2004); and *Syracuse Scenery and Stage Lighting Co.*, 342 NLRB 672, 673-674, 677 (2004). Applying those principles to the instant case, I find that the General Counsel has not shown that a substantial or motivating factor for the discharges of Stroud and Modieh was their union activities, but, even if such a showing were made, the Respondent has persuasively established that it would have discharged them in any event.

Although Stroud and Modieh were known union adherents, the Respondent did not harbor the kind of union animus against them that would lead to the inference that it discharged them for their union activities. Respondent had dealt with unions not only at the Thornton facility, but at its other facilities. Moreover, although it is clear that Respondent opposed unionization of the quality control analysts, its campaign against union representation in the lab was relatively free from serious unfair labor practices. It engaged in unlawful interrogations before the union election petitions were filed and one of its supervisors unlawfully seized union caps in the lab on one occasion. But nothing in those unfair labor practices, or anything else in the record, suggests that Respondent was gunning for Stroud and Modieh and was doing so because of their union activities.

It is also true that Stroud and Modieh were fired one day before the scheduled Board election. Such timing ordinarily goes a long way to establishing the causal link between employer action and discriminatory motive. See *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984). But, in this case, the timing of the employer’s action was causally connected to a different circumstance—the discovery that Stroud and Modieh had falsified test results they had not performed. Absent a showing of pretext—that the reason

offered by the employer was false or not in fact relied on—that discovery would provide the causal connection to, and thus the reason for, the discharges, notwithstanding the immediacy of the Board election. Otherwise, pro-union employees who engage in misconduct immediately before an election would be insulated from discipline on a per se basis, something not contemplated by either the statute or Board authority. There is no evidence that Respondent had a particular desire—that was rendered more acute several days before the election than it was weeks or even months before—to remove long-time known union supporters Stroud and Modieh from the rolls before election day. Nor does anything in the record support a finding that Respondent learned anything in the last few days before the election that would cause it, precipitously, to rid itself of Stroud and Modieh for discriminatory reasons.¹⁸

On the contrary, the evidence is overwhelming that Stroud and Modieh falsified test results that they did not perform on the morning of June 27, and that this was the reason for Respondent's action against them. Stroud and Modieh were observed continuously while they were in the lab that morning by three witnesses, who credibly testified that no tests were performed. That testimony was buttressed by documentary evidence, including gradation reports that were discovered before the times listed on the reports. Neither in their interviews with management officials later in the day, on June 27, or on the next day, nor in their testimony before me did Stroud or Modieh satisfactorily show that they did perform the tests indicated on the gradation reports or in the log book. Their testimony that they did was completely unreliable. Indeed, I have also found that they falsified results for tests they did not perform on June 20 and June 25, when they were observed by quality control engineers, who were neither part of management nor directed by management to observe Stroud and Modieh on those occasions. In the face of prior complaints about quality in the products shipped to suppliers for use on state roads, and, in view of the state regulation of standards and specifications for their products, it would have been grossly negligent for the Respondent to have tolerated such falsification without acting against those responsible. Commendably, it did not. In the face of the overwhelming evidence set forth above, I cannot find that Respondent fired Stroud and Modieh for their union activities or because Respondent feared that they would vote for union representation in the Board election. Thus, I find, in accordance with the weight of the evidence, that Respondent fired Stroud and Modieh for falsifying results of tests they did not perform, not for engaging in union activities.

Nor has the General Counsel shown that the reason Respondent advanced for the discharges was pretextual. Stroud and Modieh failed to perform tests and falsified test results; and that is why the Respondent fired them. Contrary to the General Counsel, the Respondent did not treat Stroud and Modieh differently from other employees who engaged in similar conduct. The examples of allegedly comparable conduct offered by the

¹⁸ Surely, with the assistance of counsel, Respondent had to know that the simple discharge of 2 union adherents immediately before a Board election would not mean that they could not vote. Predictably, Stroud and Modieh were in fact permitted to vote and their votes were challenged. It was thus obvious that the discharges would be a matter of litigation no matter what, of which the Respondent's president candidly testified he was aware, when he participated in the deliberations leading to the discharges.

General Counsel that did not result in immediate discharge are distinguishable. All involved union-represented employees who were subject to different work rules, including a progressive discipline policy; and they were covered by a union contract, which obviously included a grievance procedure that led to settlement of some of the alleged misconduct.

5 Nor was the misconduct in those examples as serious as those involved in this case. That misconduct mostly involved employees getting paid for time not worked; there is no detail as to how much time was taken inappropriately. In contrast, here, Stroud and Modieh falsified results of tests they did not perform; those tests were required to be performed by
10 state regulatory agencies. Indeed, their impropriety was also far worse than the examples of immediate discharge provided by the Respondent, but those examples are closer to the misconduct involved here than are the General Counsel's examples. When, after investigation, Respondent learned that its employees were complicit in falsifying weights that increased truck driver compensation, it acted quickly and decisively. The employees
15 were discharged or given the opportunity to resign in lieu of discharge. That is exactly what the Respondent did with Stroud and Modieh. Accordingly, a consideration of comparable examples of discipline does not support a finding that the discharges were pretextual, but rather supports a finding that they were consistent with Respondent's policy and previous examples of its handling of wrongdoing. In any event, I find that the
20 conduct involved in this case was so unique and so serious that it would have justified immediate discharge, without regard to any previous disciplinary action by Respondent in different circumstances.

25 In their briefs, the General Counsel and the Charging Party attempt to show that the discharges were motivated by anti-union considerations and that the Respondent's reason for the discharges was a pretext. Those attempts are unavailing. Some of the arguments made in the briefs are answered in my findings of fact, credibility resolutions and discussion set forth above. Other arguments rely on factors that might suggest
30 discrimination or pretext in other circumstances, but do not, in the circumstances of this case. For example, it is inconsequential that Stroud and Modieh had received good evaluations in the past and were not previously issued disciplinary warnings. They had not, so far as the record shows, previously falsified results for tests they did not perform, the offense for which they were fired. Nor did Respondent know about and tolerate such
35 falsifications in the past.

The General Counsel's contention that Respondent placed Stroud and Modieh under "heavy surveillance" on June 20 and 25 (G.C. Br. 33) is unsupported by the record.
40 Nor, contrary to the Charging Party's contention (C.P. Br. 23), was there a delay in applying discipline. There is no record evidence that Barthel or Polaczek were supervisors or agents of Respondent—indeed, the General Counsel did not allege as much in the complaint. Nor was there any evidence that they were initially enlisted to spy on Stroud
45 and Modieh by management officials or that their observations of Stroud and Modieh were prompted or motivated by anti-union considerations. They were whistleblowers in the purest sense. Nor do I find anything sinister in Barthel's waiting to notify Polaczek and the latter's delay for a few hours in notifying his superiors. It would be natural for an
50 employee to be careful before accusing fellow employees of such serious misconduct and to have some confirmation before reporting the matter to management officials. Obviously, when these observations were reported to management, Respondent directed further observations on June 27. It was perfectly appropriate for Respondent to verify what

Barthel and Polaczek had reported. In any event, such verification was not motivated by anti-union considerations. It was motivated by a concern that test results were being falsified. That verification extended to interviews of Stroud and Modieh, in which they failed to satisfactorily exculpate themselves. Thus, contrary to the contentions of the General Counsel and the Charging Party (G.C. Br. 33, C.P. Br. 26), Stroud and Modieh were not fired simply for “mistakenly” recording an incorrect time on gradation reports and they were given every opportunity to explain their positions. Moreover, contrary to the Charging Party’s contention (C.P. Br. 27), there was no reason to observe the second shift employees on June 27 because the initial reports of Barthel and Polaczek only focused on the improprieties of Stroud and Modieh.

The General Counsel and the Charging Party do raise one point that gives me pause—Respondent did not apparently blame Pronoitis for his lack of supervision of employees who falsified results of tests they did not perform. See G.C. Br. 31; C.P. Br. 27-28. I am convinced, however, that Pronoitis did not suspect that test results were being falsified until Barthel and Polaczek brought the matter to his attention. He was, of course, not involved in the falsification itself. Although Pronoitis fell down on his job of supervising the first shift quality control analysts, that point alone does not establish either a discriminatory motive or a pretext in the discharge of the employees who actually were responsible for the falsification.

Finally, I cannot accept the Charging Party’s argument (C.P. Br. 32-35) that the gradation reports and the log book entries support the notion that Stroud and Modieh did not do anything wrong. My assessment of those documents is that they support the credible testimony of the observers not only on June 27, but also on June 20 and 25, as I have indicated above. I do not have to figure out how Stroud and Modieh entered bogus numbers into the log book and the gradation reports; I only find, based on all the evidence, that they did so, and that they did not do the testing that would have honestly supported those numbers. The Charging Party also conveniently overlooks the testimony of Stroud and Modieh that they did not perform anything like the number of tests listed in the log book for June 27.

Even if somehow I could find that the General Counsel made an initial showing that the discharges here were motivated by anti-union considerations, I would find, for the reasons already stated above, that the Respondent has persuasively shown that it would have fired Stroud and Modieh even in the absence of anti-union considerations. Accordingly, I find that the Respondent did not violate Section 8(a)(3) and (1) of the Act when it discharged employees Stroud and Modieh.

Conclusions of Law

1. By coercively interrogating employees and by confiscating union caps, Respondent has violated Section 8(a)(1) of the Act.
2. The above violations are unfair labor practices within the meaning of the Act.
3. The Respondent has not otherwise violated the Act.

4. The challenges to the votes of Greg Stroud and Ammar Modieh are sustained since they were properly discharged for cause prior to the election.

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended¹⁹

ORDER

The Respondent, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities.

(b) Confiscating the union caps or similar union material of employees.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days after service by the Region, post at its office and place of business in Thornton, Illinois, copies of the attached notice marked "Appendix."²⁰ Copies of the notice on forms provided by the Regional Director for Region 13, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 11, 2007.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

²⁰ If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

Dated, Washington, D.C., January 7, 2008.

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APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

**Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities**

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT confiscate the union caps or similar union material of employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

**HANSON MATERIAL SERVICE
CORPORATION**

(Employer)

Dated _____ **By** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

209 South LaSalle Street, 9th Floor

Chicago, Illinois 60604

Hours: 8:30 a.m. to 5 p.m.

312-353-7570.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF
POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER
MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS
PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE
OFFICER, 312-353-7170.**